

**STATE OF WISCONSIN**  
**Department of Commerce**

---

*In the Matter of the PECFA Appeal of*

Rodney Greil  
Greil American Family Agency  
303 W Wisconsin Ave  
Tomahawk WI 54487

PECFA Claim #54487-1133-03  
Hearing #02-154

---

**FINAL DECISION**

**P R E L I M I N A R Y   R E C I T A L S**

Pursuant to a petition for hearing filed April 1, 2002, under §101.02(6)(e), Wis. Stats., and §Comm 47.53, Wis. Adm. Code, to review a decision by the Department of Commerce, a hearing was commenced on August 5, 2002, at 201 West Washington Street, Madison, Wisconsin.

There appeared in this matter the following persons:

**PARTIES IN INTEREST:**

Rodney Greil  
Greil American Family Agency  
303 W Wisconsin Ave  
Tomahawk WI 54487

By: Steven J. Ossek  
Envirogen  
1285 Rudy Street  
Onalaska, WI 54650-0684

Department of Commerce  
PECFA Bureau  
201 West Washington Avenue  
PO Box 7838  
Madison WI 53707-7838

By: Kristiane Randal

Department of Commerce  
201 W. Washington Ave., Rm.321A  
PO Box 7838  
Madison WI 53707-7838

The authority to issue a proposed decision in this matter has been delegated to the undersigned by order of the Secretary dated July 2, 2002. The matter now being ready for decision, I hereby issue the following:

### **FINDINGS OF FACT**

1. At all times material, Rodney Greil was the legal owner of the premises located at 303 W. Wisconsin Avenue, Tomahawk, Wisconsin.
2. On or before 1/7/02, the Appellant filed a claim for reimbursement of expenses associated with site cleanup for the premises described in Paragraph 1 in the total amount with additions of \$92,761.6 with the Wisconsin Department of Commerce, (hereinafter the "Department"). On 3/12/02, the Department made reimbursement in the amount of \$89,369.90.
2. The Appellant appealed the Department's denial of the following elements of his initial claim:
  - a. \$879.00 for costs associated with the excavation and replacement of the sidewalk adjacent to the Appellant's property.
3. By invoice dated 10/12/99, John C. Schoone Construction, Inc. charged the Appellant \$879.00 reflecting the cost for "Removal & Replacement of City of Tomahawk Sidewalk".

4. John C. Schoone Construction, Inc. had been the successful lowest bidder on the Appellant's remediation project. The \$879.00 excavation fee was not included in John C. Schoone Construction, Inc.'s bid.
5. The Department denied reimbursement of the sidewalk excavation and replacement cost.

## **DISCUSSION AND CONCLUSIONS OF LAW**

### **A. Preliminary Matters**

Both parties agreed that interest costs associated with the sidewalk excavation were no longer contested and thus not relevant to the current proceeding.

The Judge notes for the record that the Department's attorney informed the Appellant's representative that the Administrative Law Judge allegedly received information regarding the issue involved herein from a PECFA hydro geologist during an ex parte discussion held prior to the date of this hearing. The Department's attorney purports to raise an issue regarding the Administrative Law Judge's ability to render an impartial and fair decision in the present matter because of this alleged ex parte communication. The Administrative Law Judge's ability to render an objective, impartial and fair decision has not been compromised specifically because the present matter was not part of any discussion which occurred between the Administrative Law Judge and the PECFA hydro geologist.

### **B. Substantive Issues**

The specific issues for determination are as follows:

1. Whether the sidewalk replacement costs are third party costs that the Department is obligated to pay.

2. Whether the Appellant's ability to obtain reimbursement for the sidewalk replacement costs should be allowed as a Comm 47.33(5) exception since said costs were not included in the three original bid proposals.

Third Party Costs.

The Appellant argues that because the sidewalk is in a right of way owned by the city, the excavation and replacement costs associated with the sidewalk should be reimbursed as third party costs. Conversely, the Department's witness credibly testified that in the eleven years she has worked in the PECFA program, no claim reviewer has ever reimbursed a responsible party for costs associated with sidewalk replacement. The Department also states that the Appellant provided no information to suggest that the Village of Tomahawk had agreed to assume the financial burden of the sidewalk replacement. The Department also argues that even if the sidewalk replacement was a third party cost, the Appellant failed to provide several pieces of information necessary for reimbursement, including the depreciable value of the sidewalk.

This Administrative Law Judge agrees that the Appellant provided insufficient evidence to indicate that the sidewalk cost was one over which the village either explicitly or impliedly assumed responsibility. The Administrative Law Judge also finds that even if the replacement cost was deemed to be a third party cost, the Appellant did not provide sufficient information to establish the value of the existing sidewalk for replacement and reimbursement purposes. Since the Appellant did not provide documentation that the sidewalk costs are third party costs and did not provide information indicative of appropriate replacement value, its claim for reimbursement cannot be compensated as a third party cost.

Commodity Services Bid Exception.

Comm 47.33(1)(b)(1) provides that all commodity services shall be obtained through a competitive bidding process. In this case, the sidewalk replacement was not included in any of the three bids. The Appellant argued that the sidewalk excavation did not need to be bid because its cost did not exceed one thousand dollars (\$1,000.00). The excavation service was thus excepted from the bidding requirements pursuant to Comm 47.33(5)(a).

The Appellant's argument that the cost should be characterized as one falling within this commodity bidding exception cannot be sustained. The sidewalk costs were associated with excavation activities that had been previously bid. The service provider retained to engage in excavation was the same one that performed the sidewalk work. This work was a necessary extension of the overall excavation process, not a discrete commodity service item. Comm's 47.33(5)(a) exception cannot logically be interpreted to provide an exemption to PECFA's bidding requirements for individual components of an overall commodity service. According to this line of reasoning, any unanticipated cost within the applicable dollar amount would fit within the bidding exemption whether or not it was a cost associated with a broader commodity service. Interpreting the exception in this way would dilute the Department's ability to control reimbursable costs through the use of the competitive bidding process.

## **DECISION**

The Department is not required to reimburse the Appellant for the costs associated with the sidewalk excavation and replacement.

Dated: \_\_\_\_\_

---

Mari A. Samaras-White  
Administrative Law Judge  
Department of Commerce  
PO Box 7970  
Madison WI 53707-7970

Copies to:

Rodney Greil  
Greil American Family Agency  
303 W Wisconsin Ave  
Tomahawk WI 54487

By: Steven J. Ossek  
Envirogen  
1285 Rudy Street  
Onalaska, WI 54650-0684

Kristiane Randal  
Department of Commerce  
201 W. Washington Ave., Rm.321A  
PO Box 7838  
Madison WI 53707-7838

## **REQUEST FOR REHEARING/JUDICIAL REVIEW**

**Hearing #02-154**  
**Commerce # 54487-1133-03**

### **Request for New Hearing**

**Petitions for new hearings must be received no later than 20 days after the mailing date of this hearing decision.**

If, after you receive the decision, you believe it was based on a mistake in the facts or the law, you may request a new hearing. You may also ask for a new hearing if you have found new evidence which would change the decision and which you could not have discovered sooner through due diligence. **To ask for a new hearing**, send or deliver a written request to Rehearing Request, Department of Commerce, Office of Legal Counsel, 201 W. Washington Avenue, 6<sup>th</sup> Floor, PO Box 7970, Madison, WI 53707-7970. Rehearing requests may also be filed by fax at the following number: (608) 266-3447. Faxed rehearing requests received after 4:30 p.m. on a business day will be filed effective the next business day.

Your request must explain why you believe the hearing examiner's decision is wrong. If you have new evidence to submit, you must describe your new evidence and explain why you did not have it at your first hearing. If you do not explain how your request for a new hearing is based on either a mistake of fact or law or on the discovery of new evidence which could not have previously been obtained through due diligence on your part, your request will be denied.

The petition for new hearing must also be sent or faxed to all other parties named in this decision as "PARTIES IN INTEREST." **Late requests cannot be granted.** The process for asking for a new hearing is in Sec. 227.49 of the state statutes

### **Petition For Judicial Review**

**Petitions for judicial review must be filed no more than 30 days after the mailing date of this hearing decision** as indicated below (or 30 days after a denial of rehearing, if you ask for one). The petition for judicial review must be served on the Secretary, Department of Commerce, Office of the Secretary, 201 W. Washington Avenue, 6<sup>th</sup> Floor, PO Box 7970, Madison, WI 53707-7970.

The petition for judicial review must also be served on all other parties named as "PARTIES IN INTEREST". **Late requests cannot be granted.** The process for judicial review is described in Sec. 227.53 of the statutes.

Dated: \_\_\_\_\_

**PARTIES IN INTEREST:**

Rodney Greil  
Greil American Family Agency  
303 W Wisconsin Ave  
Tomahawk WI 54487

By: Steven J. Osese  
Envirogen  
1285 Rudy Street  
Onalaska, WI 54650-0684

Kristiane Randal  
Assistant Legal Counsel  
Office of the Secretary  
Department of Commerce

Date Mailed: \_\_\_\_\_

Mailed By: \_\_\_\_\_